APPENDIX A

[Court of Appeals Opinion]

No. 73-1451

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Appellee,

vs.

GUARANTY BOND AND SECURITIES CORP., ET AL.,
Defendants,

JAMES C. BARBOUR, Receiver,
Appellant.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 23, 1974.

Before: PHILLIPS, Chief Judge CELEBREZZE and MILLER, Circuit judges.

MILLER, Circuit Judge. Guaranty Bond and Securities Corporation was registered with the S.E.C. as a broker and dealer in securities as required by Section 15(b) of the Securities Exchange Act of 1934. As part of its business, it promoted the sale of church bonds. On December 22, 1970, the S.E.C. filed in the court below a complaint against Guaranty alleging net capital violations contrary to the federal securities laws, including Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 780(c)(3). Injunctive relief was sought against the alleged violations.

The district court, finding that Guaranty had violated the S.E.C.'s net capital rule and that such violation had existed

for a substantial period of time prior to the filing of the complaint by the S.E.C., granted a preliminary injunction. The court further found that between the filing of the complaint on December 22, 1970 and the granting of the injunction on January 6, 1971, Guaranty had continued to engage in substantial business, handling 101 transactions after the effective date of the Act creating the Security Investor Protection Corporation. On application of S.E.C., a receiver was appointed for Guaranty to take charge of all of its assets subject to the further orders of the court.

On March 31, 1972, the receiver filed a petition for an order directed to the S.E.C. and the Security Investor Protection Corporation requiring each of them to show cause why S.I.P.C. should not be required to intervene in the action and afford to the customers of Guaranty the benefits of the Act. The show cause order was issued accordingly and both S.E.C. and S.I.P.C. responded. The court, without an evidentiary hearing, filed its memorandum opinion in which it found the Act (S.I.P.A.) was inapplicable to customers of Guaranty for the reason that Guaranty was insolvent and in financial difficulties before the effective date of S.I.P.A. To hold otherwise, it was said, would be to give the Act a forbidden retroactive effect. The court accordingly ordered that S.I.P.A. should be dismissed from the action. This order was certified as a final judgment for purposes of appeal.

The Security Investor Protection Act was enacted in response to the need to protect the customers of securities brokers and dealers which might fail, thereby jeopardizing the cash and securities that customers had left on deposit with the firm.[1] S.I.P.A. accordingly created the Security

1. The legislative history shows the purpose of the S.I.P.A.
The serious and persistent financial problems besetting the securities industry in recent months have led to the voluntary

Investor Protection Corporation as a "non-profit corporation," not designed to "be an agency or establishment of the United States Government," but rather to be "a membership corporation,"[2] consistent with the self-regulatory nature of the securities industry. 15 U.S.C. 78 ccc (a). The S.I.P.C.'s role is primarily one of consultation and cooperation with the self-regulatory organizations which remain subject to the federal securities laws and the rules of the S.E.C. By mandating membership in the S.I.P.C. for certain members of the securities industry and by granting the S.I.P.C. general assessment authority over the members in order to establish an S.I.P.C. fund, Congress accomplished its intention that the cost of providing protection to cus-

---

liquidations, mergers, receiverships or, less frequently, bankruptcies of a substantial number of brokerage houses. Such failures may lead to loss of customers' funds and securities with an inevitable weakening of confidence in the U. S. securities markets. Such lessened confidence has an effect on the entire economy. Whatever other steps must be taken to improve these conditions, one objective of the bill, as reported, is to provide investors protection against losses caused by the insolvency of their broker-dealer. The need is similar, in many respects to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation.

4 U. S. Code Congressional and Administrative News 5255 (1970).

2. The members of S.I.P.C., as defined by 15 U.S.C. Sec. 78 ccc (a) (2), are:

(A) all persons registered as brokers or dealers under section 78o(b) of this title, and

(B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts;

tomers under S.I.P.C. was to be borne by the securities industry itself.[3]

Under 15 U.S.C. Sec. 78 eee (a)(1), if the S.E.C. or any self-regulatory organization believes that a broker or dealer subject to its regulations in, or approaching, financial difficulty, it must notify immediately the S.I.P.C. If the S.I.P.C. determines that a member broker or dealer has failed or is in danger of failing to meet its obligations to customers, it is authorized to seek a decree in an appropriate court adjudicating that the customers of a member of S.I.P.C. are in need of the protection of the Act. 15 U.S.C. Sec. 78 eee (a)(2). Upon so finding, the district court shall grant the decree and appoint a trustee for the liquidation of the business and an attorney for the trustee. The objectives of the proceeding, in addition to operating the business for a limited purpose, completing the open contractual commitments of the dealer, enforcing rights of subrogation and liquidating the business of the dealer, are "as promptly as possible" (1) to return specifically identifiable property to the customers of a firm, (2) to distribute the "single and separate fund," and (3) to pay to customers monies advanced by S.I.P.C. 15 U.S.C. 78 fff(a). To provide for prompt satisfaction of the net equities of the dealer's customers, S.I.P.C. must advance to the trustee such monies as may be required to satisfy the full claims of each customer not to exceed $50,000. 15 U.S.C. 78 fff(f).

---

3. S.I.P.C.'s first responsibility under the Act was to establish a fund which would consist of all amounts received by S.I.P.C. and from which all expenditures would be paid. 15 U.S.C. Sec. 78 ddd(c). If the fund should become insufficient for the purposes of the Act, the S.E.C. is authorized, if necessary for the protection of the customers of brokers and dealers and for the maintenance of confidence in the United States securities markets, to issue notes under certain conditions to the Secretary of the Treasury in an amount up to one billion dollars, which then may be lent to S.I.P.C. 15 U.S.C. 78 ddd (g).

If S.I.P.C. refuses to act, the S.E.C. is authorized by 15 U.S.C. 78 ggg(b),[4] to apply to the court for an order requiring the S.I.P.C. to discharge its obligations under the Act.

The present appeal involves a unique situation. The appellant, as mentioned earlier, urges, contrary to the district court's decision, that the Act is applicable to Guaranty Bond. The S.E.C. agrees with the appellant's contention that the Act is applicable, but challenges the court's decision that the receiver has standing to petition the court to apply the Act. The S.I.P.C. agrees with the district court as to the inapplicability of the Act but challenges, along with the S.E.C., the receiver-appellant's standing to obtain compliance with the Act.

The S.I.P.A. was effective on December 30, 1970. In two cases, *Lohf* v. *Casey*, 330 F.Supp. 356 (D. Colo. 1971), aff'd. 466 F.2d 618 (10th Cir. 1972) and *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, 352 F.Supp. 937 (N.D. Texas 1973), courts have held that S.I.P.A. was not intended to apply to a broker-dealer who had failed prior to that date. The district court in *Lohf, supra* at 358 stated:

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:

4. 15 U.S.C. 78 ggg (b) provides that:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

As mentioned above, this section is hardly couched in terms of exclusivity—a feat easily accomplished had it been the intent of Congress.

> 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H.R. Rep. No. 1613, 91st Cong., 2nd Sess. 14 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'
>
> This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

Congress seemed to be concerned that S.I.P.C. not be used to compensate customers of members firms of the New York Stock Exchange which "have closed their doors and begun liquidation," when the Exchange had not advanced money from its existing trust fund to protect the customers of those firms. As mentioned earlier in the *Lohf* quote, the Committee Report did use very broad language when it stated that coverage be withheld from firms "either in net capital violation, in liquidation, or in bankruptcy at the time of the creation of S.I.P.C." H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. p. 14 (1970). The meaning of this broad language was subsequently clarified by Representative Moss, sponsor of the Bill, on the floor of the House, when he stated:

> "Finally, we have been concerned all along with the problem of providing protection to the customers of *firms that might fail before enactment of the bill into law*. We early anticipated this possibility but we have specifically declined to make the bill retroactive in its application. The bill is prospective from the date of its enactment." [emphasis supplied] 116 Cong. Rec. 39350-39351, 12-1-70).

Congress, lacking precise information on the condition of the industry, was concerned with the impact that S.I.P.C. coverage might have on the Treasury. The losses that had already been experienced by the industry were regarded by Congress as the industry's responsibility. S. Rep. No. 1218,

91st Cong. 2d Sess. 6 (1970); H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 14 (1970).

Clearly to apply S.I.P.C. to a firm that was bankrupt prior to the Act would be to give the Act a retroactive application that runs counter to the Act's clear purpose as reflected by its legislative history. However, application of the Act to Guaranty would not be in our view a retroactive application. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to its enactment." *Cox* v. *Hart,* 260 U.S. 427 (1922). The time period of the financial difficulties of the broker-dealer bears more on the status of the broker within the meaning of the Act than upon the issue of retroactivity.

The court in *Lohf* found the absence of business activity subsequent to the effective date of the Act as determinative of the non-coverage issue when it stated:

> However, it is apparent that plaintiff was not conducting its business as a broker or dealer at the effective date of the Act. The business was in the jurisdiction of the bankruptcy court, and the day to day decisions were being made by the trustee. We cannot consider plaintiff then to be a "broker or dealer," whether registered or not, as contemplated by the Act. It makes no difference for these purposes that plaintiff's registration had not been officially terminated, and thus the automatic membership in the Securities Investor Protection Corporation may have continued in form. It could not be expected that the Act could be applied to firms which had already gone out of business. Plaintiff thus did not have the status of a broker or dealer for the purposes of the Act. 466 F.2d at 620.

The district court in *Behart-McCaslin Ventures, Inc., supra* at 940 made a similar determination when it stated:

> For purposes of determining coverage under the Act, this Court discerns no legal difference between a firm in bankruptcy and a firm in the financial and

> legal condition which Midwestern suffered prior to the effective date of the Act. Midwestern, prior to the effective date of the Act, had ceased to be a broker-dealer in any real sense of that terms and has not resumed the normal activities of a broker-dealer even at the present time.

These determinations are not applicable to Guaranty since it actually conducted a substantial business after the effective date of the Act. In light of the purposes of the Act, the 101 transactions conducted by Guaranty after the effective date are sufficient, we believe, to qualify Guaranty's customers for the protection provided by the Act. As the Tenth Circuit stated in *Lohf* concerning the coverage of the Act:

> We must take this to mean firms or persons which were actually in business in the usual sense at the critical date were the "brokers or dealers" referred to. Congress was willing to extend coverage to then financially weak institutions and those of unknown strength, but the line was drawn to exclude those which had failed and were thus in fact not brokers or dealers. Supra at 621.

We hold that Guaranty, though financially weak, was, in fact, a broker or dealer at the effective date of the Act.

The court below focused on the filing date of the action against Guaranty by the S.E.C. which was prior to the effective date of the Act. However, the S.E.C. did not seek to force Guaranty into receivership until after the effective date. Therefore, the filing of the original S.E.C. action did not prevent Guaranty from conducting normal business after the effective date of the Act and thus qualifying as a broker-dealer.

The S.I.P.C. and the S.E.C. challenge the receiver's standing to bring an action to compel either of them to act under the S.I.P.A. The court below held that the provi-

sions of the Act "do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of S.I.P.C." We agree. The appellees point to an absence of express language providing for an enforcement action by the customers of a securities company or their representatives as prohibiting such an action. We are persuaded, however, that the lack of express language of exclusivity in providing for an enforcement action by the S.E.C., coupled with a general provision allowing for suits against the S.I.P.C.,[5] evidences an intent by Congress that the statute should not be as narrowly construed as the appellees urge.

The customers of Guaranty have a definite interest in the application of the S.I.P.A. to the present litigation. The receiver, the representative of the customers of Guaranty, seeks to have the S.I.P.C. meet its obligations to the customers under the broad purposes of the S.I.P.A. Apparently, the S.I.P.C. has not attempted to obtain an adjudication of the necessity for providing the protections of the S.I.P.A. to the customers of Guaranty. Nor has the S.E.C. moved to compel the S.I.P.C. to meet its obligations. We do not believe that Congress intended under such circumstances to leave the customers of securities firms without remedy under the S.I.P.A. Furthermore, despite the appellees urgings, we find no constitutional[6] or statutory

5. 15 U.S.C. 78 ccc (b) (1) provides that the S.I.P.C. has the power "to sue and be sued, complain and defend, in its corporate name, through its own counsel, in any court, State or Federal."

6. To meet the "case or controversy" requirement of the Constitution, the Supreme Court has formulated a standard for ascertaining those persons with "standing" for maintaining an action in a federal court. The standard as defined by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1971), is that one must have suffered "injury in fact" and the injury must be an "interest arguably within the zone of interests to be protected." The customers of Guaranty and their representative clearly meet this broad standard. *See also Data Processing Service* v. *Camp*, 397 U.S. 150.

prohibition[7] to the maintenance of an enforcement action by the receiver in this case.[8]

The judgment of the district court holding the S.I.P.A. inapplicable and dismissing the action as to S.I.P.C. must therefore be reversed for the reasons stated herein. Since we reject the premise on which the S.I.P.C. was dismissed as a party to the action—inapplicability of the S.I.P.A. to a company of Guaranty's status—the action is remanded to the district court for processing consistent with this opinion and specifically to determine and enforce any rights of Guaranty's customers under the S.I.P.A.

---

7. As mentioned earlier, there are no terms of exclusivity of enforcement in the statute.

8. The S.I.P.C. also attacks the jurisdiction—both subject matter and in personam—of the district court to entertain this action. We find that the district court sufficiently disposed of these contentions in its memorandum opinion.

FILED
APRIL 23, 1974
JAMES A. HIGGENS, *Clerk*

APPENDIX B

[Court of Appeals Judgment]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1451

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

GUARANTY BOND AND SECURITIES CORPORATION, ET. AL.,
Defendants,

JAMES C. BARBOUR, RECEIVER,
Appellant.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings.

It is further ordered that Appellant recover from Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN

Clerk

A True Copy.

Attest:

John P. Hehman, Clerk

Issued as Mandate:

Costs To be recovered by Appellant	
Filing fee	$25.00
Printing	$ —
Total	$25.00

APPENDIX C

[District Court Opinion]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil Action No. 5989

SECURITIES AND EXCHANGE COMMISSION

vs.

GUARANTY BOND AND SECURITIES CORPORATION, et al.

MEMORANDUM—No. 54

On December 22, 1970, the Securities and Exchange Commission (hereinafter the "Commission") filed a complaint and moved for a preliminary injunction against Guaranty Bond and Securities Corporation (hereinafter "Guaranty") on the basis of alleged violations of the Securities Exchange Act of 1934 and of the Securities Exchange Act of 1933. On January 6, 1971, the injunction was granted, and this court found, among other things, that Guaranty had violated the Commission's net capital rule by doing business (1) while its net capital was less than $5,000, and (2) while its aggregate indebtedness exceeded 2,000 per centum of it net capital, see § 15(c)(3) of the Exchange Act, 15 U.S.C. § 78o(c)(3) and Rule 15c3-1, 17 C.F.R. 240.15c3-1, and that the net capital violation had existed for a substantial period of time prior to the filing of the complaint by the Commission. In the period from December 22, 1970, to January 6, 1971, Guaranty continued to do business, and prior to January 6, handled 101 transactions during 1971. Then, pursuant to

the Commission's motion, a receiver was appointed by agreed order entered on January 29, 1971.

On May 27, 1971, the receiver made demand upon the Securities Investor Protection Corporation (hereinafter "SIPC") for protection of Guaranty's customers under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa, *et seq.* (hereinafter the "Act"), but SIPC refused. The Commission had not given SIPC a formal notice as provided by § 5(a)(1) of the Act that Guaranty was approaching financial difficulty, and had taken no other action to see that SIPC intervened. On April 6, 1972, pursuant to the receiver's petition, an order was entered requiring the Commission and SIPC to show cause why the remedies afforded by the Act should not be made available in this situation. Guaranty has been registered with the Commission as a broker-dealer under § 15 of the Securities Exchange Act, 15 U.S.C. § 78o, since June 20, 1962, and was therefore a member of SIPC on December 30, 1970, the date the Act became effective. See § 3(a) of the Act, 15 U.S.C. § 78ccc(a). The case is now before the court upon SIPC's response, which asserts three principal reasons why the relief requested should be denied: (1) lack of personal jurisdiction over SIPC; (2) lack of subject matter jurisdiction; and (3) exclusion of Guaranty by the terms of the Act.

Personal Jurisdiction

SIPC alleges that it is a non-resident foreign corporation created by Congress and that effective service of process can only be achieved in accordance with Rule 4(d)(7), 4(e) and 4(f) of the Federal Rules of Civil Procedure, which in turn would require application of Tennessee law governing service of process on foreign corporations. SIPC asserts that since it is not doing business in Tennessee, it is not subject to service of process issued in Tennessee.

This contention must be rejected. The Act plainly provides that SIPC will impose assessments on its members, collect these assessments through its collection agent, and extend protection to customers of its members. Since many members of SIPC are located within the state of Tennessee, it necessarily follows that the execution of these statutory activities anticipates a continuing relationship between SIPC and its members and customers, and the doing of these acts within the state of Tennessee necessary to achieve the purposes for which the Act was conceived. The nature of this relationship and the protection which SIPC affords Tennessee investors is sufficient in this court's opinion to warrant the exercise of in personam jurisdiction consistent with due process, and to be " . . . such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe* v. *State of Washington*, 326 U.S. 310, 316 (1945). *See also, McGhee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

The court finds this holding to be consistent with the Tennessee long-arm statute, T.C.A. § 20-235, *et seq.*, which has been construed by the Tennessee courts as conferring " . . . jurisdiction over non-resident defendants to the extent permitted by the due process clause," *Darby* v. *Superior Supply Co.*, 224 Tenn. 540, 458 S.W.2d 423, 426 (1970), and in accord with this circuit's interpretation of that statute's permissible breadth under the due process clause of the Fourteenth Amendment. *See King* v. *Hailey Chevrolet*, 462 F.2d 63 (6th Cir. 1972); *Southern Machine Company* v. *Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). Certainly it can be said that ". . . Tennessee has an interest in resolving the conflict at issue. . . ." *Southern Machine Company* v. *Mohasco Industries, Inc., supra*, at 384.

SUBJECT MATTER JURISDICTION

SIPC asserts that although by § 3 of the Act it is made subject to and granted all the powers conferred upon a non-public corporation by the District of Columbia Non-Profit Corporation Act, and is granted additional powers under subsection (b) to sue and be sued in any court, state or federal, there is a clear congressional mandate that enforcement actions against SIPC must be brought where its principal office is located. This assertion is based upon the fact that § 7(b) provides that in the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligation under the Act, and that had the Commission elected to seek enforcement in this case, the action would have to have been brought in Washington, D. C., the location of the principal and only office of SIPC.

For this reason, SIPC asserts that the court lacks subject matter jurisdiction to adjudicate the relief sought. The court finds this contention without merit, for the effect of such a proposition would not only be to substantially frustrate a principal goal of the Act—protection of public investors, but would also render meaningless the language of § 3(b)(1) which confers upon SIPC the right to sue and be sued in any court, state or federal. Had the instant proceeding been instituted in this court by the Commission rather than the receiver, then under § 7(b) of the Act dismissal of the action for improper venue if not lack of subject matter jurisdiction might logically be required. However, the fact that the receiver's enforcement action here is of the same type which, under § 7(b), the Commission may institute in the district court coterminous with the locale of SIPC's principal office does not compel the conclusion that the receiver must do likewise, nor that district courts other

than those of the District of Columbia lack subject matter jurisdiction over claims arising under the Act. If substance and meaning are to be given to the Act and to the legislative goal of investor protection, then the default or neglect of the Commission to institute enforcement proceedings under § 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers. When such an occasion arises, § 7(b) must be read in *pari materia* with § 3(b)(1) so as to provide a forum of practical utility to the parties involved and which can give meaningful effect to the Act as a whole in the protection of SIPC's members and their customers located throughout the country.

Since the jurisdictional interpretation sought by SIPC would, in severely limiting access to the courts, run counter to these considerations, the court finds that the provisions of § 7(b) do not limit this court's power to adjudicate an enforcement action brought by a receiver of an insolvent member of SIPC.

Exclusion of Guaranty Under the Act

SIPC contends that the application of the Act to this case would be to give it an unlawful retroactive effect. There is no dispute that the Act was intended to operate prospectively only. As stated by the court in *Lohf* v. *Casey*, 330 F. Supp. 356, 358 (D. Colo. 1971), *aff'd.* 446 F.2d 618 (10th Cir. 1972):

> ". . . it is equally clear that Congress expressed an intention of refusing to make the Act retroactive. The record is replete with comments to that effect, the most cogent example being the report of the Committee on Interstate and Foreign Commerce:
>
> " 'It is the clear intention of your committee that SIPC assume no liability for firms either in net capital violation, in liquidation, or in bankruptcy at the time of creation of SIPC. H. R. Rep. No. 1613, 91st Cong., 2nd Sess. 4 (Oct. 21, 1970), reprinted in 3 U.S. Code Cong. & Admin. News '70 at 5268.'

> "This language is frequently echoed in the debates on this bill, and it seems clear that Congress did not intend the bill to operate retroactively."

As further evidence of the scope of coverage envisioned by Congress, Representative Moss, one of the proponents of the Act and a member of the Conference Committee stated:

> "This is not anticipated as bailing out those firms or their customers. This would be outside the scope of this bill. This bill does not cover retroactively." 116 Cong. Rec. 39,362 (1970).

Notwithstanding the prospective provisions of the Act, there remains the problem of whether the relief sought here would constitute a retroactive application. The Act provides that the rights of claimants are fixed as of the "filing date". In explanation of this term, § 5(b)(4)(B) provides:

> "(B) *Filing date.*—The term 'filing date' means the date on which an application with respect to any debtor is filed under subsection (a)(2); except that if—
>
> (i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or
>
> (ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,
>
> then the term 'filing date' means the date on which such petition was filed or such proceeding commenced."

In terms of the instant proceeding, a receiver was not appointed until January 29, 1971. SIPC contends, however, that this receivership was merely an ancillary action taken pursuant to the injunction proceeding which was commenced on December 22, 1970, eight days prior to the Act's effective date. Although § 5(b)(4)(B)(ii) is rather equivo-

cal, the court is inclined to agree with SIPC that the injunction proceeding commenced on December 22, 1970, determined the filing date by reason of the receiver subsequently appointed. Furthermore, there is another persuasive factor present which compels the same conclusion. The injunction sought by the Commission was based in part upon the failure of Guaranty to meet the net capital requirements of Rule 15c3-1, 17 C.F.R. 240.15c3-1. As previously reflected by the legislative history, the Act was not intended to cover firms in such violation prior to December 30, 1970. This fact, coupled with the inescapable conclusion, drawn from evidence precipitated by the injunction proceeding, that Guaranty was hopelessly insolvent prior to December 30, 1970, persuades the court that to grant the requested relief would be a retroactive application of the Act and a clear frustration of legislative intent. Therefore, the court holds that customers of Guaranty are not entitled to protection under the Act, and it is hereby ORDERED that SIPC be dismissed as a party to this cause.

L. CLURE MORTON
L. Clure Morton
United States District Judge

APPENDIX D

[Relevant Sections of the Securities Investor Protection Act of 1970]

Section 3 §78ccc. **Securities Investor Protection Corporation**

(a) *Creation.*—There is hereby established a body corporate to be known as "Securities Investor Protection Corporation" (hereafter in this chapter referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by act of the Congress SIPC shall—

(1) not be an agency or establishment of the United States Government;

(2) be a membership corporation the members of which shall be—

(A) all persons registered as brokers or dealers under section 78*o*(b) of this title, and

(B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts; and

(3) except as otherwise provided in this chapter, be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29–1001 and fol.).

(b) *Powers.*—In addition to the powers granted to SIPC elsewhere in this chapter, SIPC shall have the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal;

* * * *

Section 4 §78ddd. **SIPC Fund**

(a) *In general.*—

(1) *Establishment of fund.*—SIPC shall establish a "SIPC Fund" (hereinafter in this chapter referred to as the "fund"). All amounts received by SIPC (other than amounts paid directly to any lender pursuant to any pledge securing a borrowing by SIPC) shall be deposited in the fund, and all expenditures

the beneficial owner of 5 per centum or more of

(2) *Balance of the fund.*—The balance of the fund at any time shall consist of the aggregate at such time of the following items:

(A) Cash on hand or on deposit.

(B) Amounts invested in United States Government or agency securities.

(C) Confirmed lines of credit.

(3) *Confirmed lines of credit.*—For purposes of this section, the amount of confirmed lines of credit as of any time is the aggregate amount which SIPC at such time has the right to borrow from banks and other financial institutions under confirmed lines of credit or other written agreements which provide that moneys so borrowed are to be repayable by SIPC not less than one year from the time of such borrowings (including, for purposes of determining when such moneys are repayable, all rights of extension, refunding, or renewal at the election of SIPC).

(b) *Initial required balance for fund.*—Within one hundred and twenty days from December 30, 1970, the balance of the fund shall aggregate not less than $75,000,000, less any amounts expended from the fund within that period.

(c) *Assessments.*—

(1) *Initial assessments.*—Each member of SIPC shall pay to SIPC, or the collection agent for SIPC specified in section 78iii (a) of this title, on or before the one hundred and twentieth day following December 30, 1970, an assessment equal to one-eighth of 1 per centum of the gross revenues from the securities business of such member during the calendar year 1969, or if the Commission shall determine that, for purposes of assessment pursuant to this paragraph, a lesser percentage of gross revenues from the securities business is appropriate for any class or classes of members (taking into account relevant factors, including but not limited to types of business done and nature of securities sold), such lesser percentages as the Commission, by rule or regulation, shall establish for such class or classes, but in no event less than one-sixteenth of 1 per centum for any such class. In no event shall any assessment upon a member pursuant to this paragraph be less than $150.

(2) *General assessment authority.*—SIPC shall, by bylaw or rule, impose upon its members such assessments as, after consultation with self-regulatory organizations, SIPC may deem necessary and appropriate to establish and maintain the fund and to repay any borrowings by SIPC. Any assessments so made shall be in conformity with contractual obligations made by SIPC in connection with any borrowing incurred by SIPC. Subject to paragraph (3) and subsection (d) (1) (A) of this section, any such assessment upon the members, or any one or more classes thereof, may, in whole or in part, be based upon or measured by (A) the amount of their gross revenues from the securities business, or (B) all or any of the following factors: the amount or composition of their gross revenues from the securities business, the number or dollar volume of transactions effected by them, the number of customer accounts maintained by them or the amounts of cash and

securities in such accounts, their net capital, the nature of their activities (whether in the securities business or otherwise) and the consequent risks, or other relevant factors.

(3) *Limitations.*—Notwithstanding any other provision of this chapter (other than section 78ccc(f) of this title)—

(A) no assessment shall be made upon a member otherwise than pursuant to paragraph (1) or (2) of this subsection,

(B) an assessment may be made under paragraph (2) of this subsection at a rate in excess of one-half of one per centum during any twelve-month period if SIPC determines, in accordance with a bylaw or rule, that such rate of assessment during such period will not have a material adverse effect on the financial condition of its members or their customers, except that no assessments shall be made pursuant to such paragraph upon a member which require payments during any such period which exceed in the aggregate one per centum of such member's gross revenues from the securities business for such period, and

(C) no assessment shall include any charge based upon the member's activities (i) in the distribution of shares of registered open end investment companies or unit investment trusts, (ii) in the sale of variable annuities, (iii) in the business of insurance, or (iv) in the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts.

(d) *Requirements respecting assessments and lines of credit.*—

(1) *Assessments.*—

(A) *½ of 1 percent assessment.*—Subject to subsection (c) (3) of this section, SIPC shall impose upon each of its members an assessment at a rate

of not less than one-half of 1 per centum per annum of the gross revenues from the securities business of such member—

(i) until the balance of the fund aggregates not less than $150,000,000 (or such other amount as the Commission may determine in the public interest),

(ii) during any period when there is outstanding borrowing by SIPC pursuant to subsection (f) or subsection (g) of this section, and

(iii) whenever the balance of the fund (exclusive of confirmed lines of credit) is below $100,000,000 (or such other amount as the Commission may determine in the public interest).

(B) *¼ of 1 percent assessment.*—During any period during which—

(i) the balance of the fund (exclusive of confirmed lines of credit) aggregates less than $150,000,000 (or such other amount as the Commission has determined under paragraph (2) (B)), or

(ii) SIPC is required under paragraph (2) (B) to phase out of the fund all confirmed lines of credit,

SIPC shall endeavor to make assessments in such a manner that the aggregate assessments payable by its members during such period shall not be less than one-fourth of 1 per centum per annum of the aggregate gross revenues from the securities business for such members during such period.

(2) *Lines of credit.*—

(A) *$50,000,000 limit after 1973. — After* December 31, 1973, confirmed lines of credit shall not constitute more than $50,000,000 of the balance of the fund.

(B) *Phaseout requirement.*—When the balance of the fund aggregates $150,000,000 (or such other

amount as the Commission may determine in the public interest) SIPC shall phase out of the fund all confirmed lines of credit.

* * * * *

Section 5 §78eee. Protection of customers

(a) *Determination of need of protection.*—

(1) *Notice to SIPC.*—If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission.

(2) *Action by SIPC.*—If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b) (1) (A) of this section, SIPC, upon notice to such member, may apply to any court of competent jurisdiction specified in section 78aa or 78u(e) of this title for a decree adjudicating that customers of such member are in need of the protection provided by this chapter.

(3) *Effect of other pending actions.*—An application under paragraph (2)—

(A) with the consent of the Commission, may be combined with any action brought by the Commission including an action by it for a temporary receiver pending an appointment of a trustee under subsection (b) (3) of this section, and

(B) may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding or any proceeding to reorganize, conserve, or liquidate such member or its property, or any proceeding to enforce a lien against property of such member.

(b) *Court action.*—

(1) *Issuance of decree.*—

(A) *Findings by court.*—A court to which application is made pursuant to subsection (a) (2) of this section shall grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter if it finds that such member—

(i) is insolvent within the meaning of section 1(19) of Title 11, or is unable to meet its obligations as they mature, or

(ii) has committed an act of bankruptcy within the meaning of section 21 of Title 11, or

(iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or

(iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or

(v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations.

(B) *Uncontested, etc., applications.*—If within three business days after the filing of an application pursuant to subsection (a) (2) of this section, or such other period as the court may order, the debtor shall consent to or fail to contest such application or shall fail to show facts sufficient to contorvert (sic) any material allegation of such application, the court shall forthwith grant the

application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this chapter.

(2) *Exclusive jurisdiction over debtor.*—Upon the filing of an application pursuant to subsection (a) (2) of this section, the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of this chapter, of a court of bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act. Pending an adjudication under paragraph (1) such court shall stay, and upon appointment by it of a trustee as provided in paragraph (3) such court shall continue the stay of, any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the debtor or its property and any other suit against any receiver, conservator, or trustee of the debtor or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the debtor or any other suit against the debtor. Pending such adjudication, such court may appoint a temporary receiver.

(3) *Appointment of trustee.*—If the court grants an application and makes an adjudication under paragraph (1), the court shall forthwith appoint as trustee for the liquidation of the business of the debtor in accordance with section 6, and as attorney for such trustee, such persons as SIPC shall specify. No person shall be appointed as such trustee or attorney if such person is not "disinterested" within the meaning of section 558 of Title 11.

(4) *Debtor and filing date defined.*—For purposes of this chapter—

(A) *Debtor.*—The term "debtor" means a member of SIPC in respect of whom an application has

been filed pursuant to subsection (a) (2) of this section.

(B) *Filing date.*—The term "filing date" means the date on which an application with respect to any debtor is filed under subsection (a) (2) of this section; except that if—

(i) a petition was filed before such date by or against the debtor under the Bankruptcy Act, or

(ii) the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor was appointed which proceeding was commenced before the date on which such application was filed,

then the term "filing date" means the date on which such petition was filed or such proceeding commenced.

(c) *SEC participation in proceedings.*—The Commission may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party.

Section 6 **§78fff. Liquidation proceedings**

(a) *General purposes of liquidating proceeding.*—The purposes of any proceeding in which a trustee has been appointed under section 78eee(b) (3) of this title (hereafter in this section referred to as a "liquidation proceeding") shall be:

(1) as promptly as possible after such appointment and in accordance with the provisions of this section—

(A) to return specifically identifiable property to the customers of the debtor entitled thereto;

(B) to distribute the single and separate fund, and (in advance thereof or concurrently therewith) pay to customers moneys advanced by SIPC, as provided in subsection (f) of this section;

(2) to operate the business of the debtor in order to complete open contractual commitments of the debtor pursuant to subsection (d) of this section;

(3) to enforce rights of subrogation as provided in this chapter; and

(4) to liquidate the business of the debtor.

(b) *Powers and Duties of Trustee.*—

(1) *Trustee powers.*—A trustee appointed under section 78eee(b) (3) of this title (hereinafter referred to as "trustee") shall be vested with the same powers and title with respect to the debtor and the property of the debtor, and the same rights to avoid preferences, as a trustee in bankruptcy and a trustee under chapter X of the Bankruptcy Act have with respect to a bankrupt and a chapter X debtor. In addition, a trustee shall have the right—

(A) with the approval of SIPC, to hire and fix the compensation of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including but not limited to accountants) that are deemed by such trustee necessary for all or any purposes of the liquidation proceeding, and

(B) to operate the business of the debtor in order to complete open contractual commitments pursuant to subsection (d) of this section,

and no approval of the court shall be required therefor.

(2) *Trustee duties.*—Except as inconsistent with the provisions of this chapter or otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee appointed under section 72 of

Title 11, except that a trustee may, but shall have no duty to, reduce to money any securities in the single and separate fund (provided under subsection (c) (2) (B) of this section) or in the general estate of the debtor.

(c) *Application of Bankruptcy Act.*—

(1) *General provisions applicable.*—Except as inconsistent with the provisions of this chapter and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96(e) of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive; except that the court may, for such period as may be appropriate, stay enforcement of, but shall not abrogate, the rights provided in section 108 of Title 11 and the right to enforce a valid, non-preferential lien or pledge against the property of the debtor. For purposes of applying the Bankruptcy Act in carrying out this section, any reference in the Bankrupty Act to the date of commencement of proceedings under the Bankruptcy Act shall be deemed to be a reference to the filing date (as defined in section 78eee(b) (4) (B) of this title).

(2) *Special provisions.*—The following subparagraphs of this paragraph shall apply to a liquidation proceeding in lieu of section 96(e) of Title 11:

(A) *Definitions.*—Except as otherwise expressly provided in this section, for purposes of this section and the application of the Bankruptcy Act to a liquidation proceeding—

(i) "property" includes cash and securities, whether or not negotiable and all property of a similar character;

(ii) "customers" of a debtor means persons (including persons with whom the debtor deals as principal or agent) who have claims on account of securities received, acquired, or held by the debtor from or for the account of such persons (I) for safekeeping, or (II) with a view to sale, or (III) to cover consummated sales, or (IV) pursuant to purchases, or (V) as collateral security, or (VI) by way of loans of securities by such persons to the debtor, and shall include persons who have claims against the debtor arising out of sales or conversions of such securities, and shall include any person who has deposited cash with the debtor for the purpose of purchasing securities, but shall not include any person to the extent that such person has a claim for property which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor or is subordinated to the claims of creditors of the debtor;

(iii) "cash customer" means, with respect to any securities or cash, customers entitled to immediate possession of such securities or cash without the payment of any sum to the debtor, and for purposes of this clause, the same person may be a cash customer with reference to certain securities or cash and not a cash customer with reference to other securities or cash;

(iv) "net equity" of a customer's account or accounts means the dollar amount thereof determined by giving effect to open contractual commitments completed as provided in subsection (d) of this section, by excluding any specifically identifiable property reclaimable by the customer, and by subtracting the indebtedness, if any, of the customer to the debtor from the sum which would have been owing by the debtor to the customer had the debtor liquidated, by sale or purchase on the filing date, all other securities and contractual commitments of the customer, and

for purposes of this definition, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers; and

(v) "securities" has the same meaning as such term has under section 96(e) of Title 11.

(B) *Single and separate fund.*—All property at any time received, acquired, or held by or for the account of a debtor from or for the account of customers except cash customers who are able to identify specifically their property in the manner prescribed in subparagraph (C), and the proceeds of all customers' property transferred by the debtor, including property unlawfully converted, shall constitute a single and separate fund; and all customers except such cash customers shall constitute a single and separate class of creditors, entitled to share ratably in such fund on the basis of their respective net equities as of the filing date and in priority to all other payments, except that (i) there shall be repaid to SIPC, in priority to all other claims payable from such single and separate fund, the amount of all advances made by SIPC to the trustee to permit the completion of open contractual commitments pursuant to subsection (d) of this section, and (ii) to the extent that any other assets of the debtor may be available therefor as otherwise ordered by the court, all costs and expenses specified in clauses (1) and (2) of section 104(a) of Title 11 shall be paid from such single and separate fund in priority to the claims of such single and separate class of creditors, and any moneys advanced by SIPC for such costs and expenses shall be recouped as such. If such single and separate fund shall not be sufficient to pay in full the claims of such single and separate class of creditors, the creditors of such class shall be entitled, to the extent only of their respective unpaid balances, to share in the general estate with gen-

eral creditors. In, or for the purpose of, distributing such fund, all property other than cash shall be valued as of the close of business on the filing date. To the greatest extent considered practicable by the trustee, the trustee shall deliver in payment of claims of customers for their net equities based upon securities held on the filing date in their accounts (after giving effect to open contractual commitments completed as hereinafter provided), securities of the same class and series of an issuer ratably up to the respective amounts which were so held in such accounts. Any property remaining after the liquidation of a lien or pledge made by a debtor shall be apportioned between his general estate and the single and separate fund in the proportion in which the general property of the debtor and the property of his customers contributed to such lien or pledge.

(C) *Specifically identifiable property.* — The trustee shall return specifically identifiable property to the customers of the debtor, entitled thereto. No cash or securities at any time received, acquired, or held by or for the account of a debtor from or for the accounts of customers shall for the purposes of this paragraph be deemed to be specifically identified, unless such property remained in its identical form in the debtor's possession until the filing date, or unless such property was allocated to or physically set aside for such customers on the filing date. In determining whether property was allocated to or physically set aside for such customers, it shall be sufficient that on the filing date:

(i) securities are segregated individually, or in bulk for customers collectively;

(ii) in the case of securities held for the account of the debtor as part of any central certificate service of any clearing corporation or any similar depositary—

(I) the records of the debtor show or there is otherwise established to the satisfaction of the trustee that all or a specified part of the securities held by such clearing corporation or other similar depositary are held for specified customers, or for customers collectively, and

(II) such records of the debtor also show or there is otherwise established to the satisfaction of the trustee the identities of the particular customers entitled to receive specified numbers or units of such securities so held for customers collectively; or

(iii) such property is held for the account of customers of the debtor in such other manner as the Commission, for the protection of customers and other creditors on a fair and equitable basis, by rule or regulation shall have determined to be sufficiently identifiable as the property of such customers.

If there is any shortage in securities of the same class and series of an issuer so segregated in bulk or otherwise held for customers pursuant to this subparagraph, as compared to the aggregate rights of particular customers to receive securities of such class and series, the respective interests of such customers in such securities of such class and series shall be prorated, without prejudice, however, to the satisfaction of any claim for deficiencies as otherwise provided in this section.

(D) Where such single and separate fund is not sufficient to pay in full the claims of such single and separate class of creditors, a transfer by a debtor of any property which, except for such transfer, would have been a part of such fund may be recovered by the trustee for the benefit of such fund, if such transfer is voidable or void under the provisions of the Bankruptcy Act. For the purpose of such recovery, the property so transferred shall be deemed to have been the property of the

debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding. Subject to the provisions of paragraph (D), if any securities received or acquired by a debtor from a cash customer are transferred by the debtor, such customer shall not have any specific interest in or specific right to any securities of like kind on hand on the filing date, but such securities of like kind or the proceeds thereof shall become part of such single and separate fund.

(d) *Completion of open contractural (sic) commitments.* —The trustee shall complete those contractural commitments of the debtor relating to transactions in securities which were made in the ordinary course of debtor's business and which were outstanding on the filing date—

(1) in which a customer had an interest, except those commitments the completion of which the Commission shall have determined by rule or regulation not to be in the public interest, or

(2) in which a customer did not have an interest, to the extent that the Commission shall by rule or regulation have determined the completion of such commitments to be in the public interest.

For purposes of this subsection (but not for any other purpose of this chapter) (i) the term "customer" means any person other than a broker or dealer, and (ii) a customer shall be deemed to have had an interest in a transaction if a broker participating in the transaction was acting as agent for a customer, or if a dealer participating in the transaction held a customer's order which was to be executed as a part of the transaction. All property at any time received, acquired, or held by or for the account of the debtor (except for cash or securities that are specifically identifiable as the property of particular customers and are not the subject of an open contractual commit-

ment), and all property in the single and separate funds shall be available to complete open contractual commitments pursuant to this subsection. Securities purchased or cash received by the trustee upon completion of any such commitment shall constitute specifically identifiable property of a customer to the extent that such commitment was completed with property which constituted specifically identifiable property of such customer on the filing date, or was paid or delivered by or for the account of such customer to the debtor or the trustee after the filing date.

(c) *Notice.*—Promptly after his appointment, the trustee shall cause notice of the commencement of proceedings under this section to be published in accordance with a designation of the court, made in accordance with the requirements of section 51 of Title 11, and at the same time shall cause to be mailed a copy of such notice to each of the customers of the debtor as their addresses shall appear from the debtor's books and records. Except as the trustee may otherwise permit, claims for specifically identifiable property (other than securities registered in the name of the claimant or segregated for him in his individual name) or claims payable from property in the single and separate fund or payable with moneys advanced by SIPC, shall not be paid other than from the general estate of the debtor unless filed within such period of time (not exceeding sixty days after such publication) as may be fixed by the court, and no claim shall be allowed after the time specified in section 93 of Title 11. Subject to the foregoing, and without limiting the powers and duties of the trustee to discharge promptly obligations as specified in this section, the court may make appropriate provision for proof and enforcement of all claims against the debtor including those of any subrogee.

(f) *SIPC advances to trustee.*—

(1) *Advances for customers' claims.*—In order to provide for prompt payment and satisfaction of the net equities of customers of debtor, SIPC shall advance to the trustee such moneys as may be required to pay or otherwise satisfy claims in full of each customer, but not to exceed $50,000 for such customer; except that—

(A) insofar as all or any portion of the net equity of a customer is a claim for cash, as distinct from securities, the amount advanced by reason of such claim to cash shall not exceed $20,000;

(B) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(C) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any claims of any customer who is a general partner, officer, or director of the debtor, the beneficial owner of 5 per centum or more of any class of equity security of the debtor (other than a non-convertible stock having fixed preferential dividend and liquidation rights) or limited partner with a participation of 5 per centum or more in the net assets or net profits of the debtor; and

(D) no such advance shall be made by SIPC to the trustee to pay or otherwise satisfy claims of any customer who is a broker or dealer or bank other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank or otherwise, that claims of such broker or dealer or bank against the debtor arise out of transactions for customers of such broker or dealer or bank, in which event, each such customer of such broker or dealer or bank shall be deemed a separate customer of the debtor.

To the extent that moneys are advanced by SIPC to the trustee to pay the claims of customers, SIPC shall be subrogated to the claims of such customers with rights and priorities provided in this section.

(2) *Other advances.*—SIPC may advance to the trustee such moneys as may be required to effectuate subsection (b) (1) (A) of this section. SIPC shall advance to the trustee such moneys as (with those available pursuant to subsection (d) of this section) may be required to effectuate subsection (d) of this section.

(g) *Payments to customers; no proof of claim required.*—It shall be the duty of the trustee to discharge promptly, in accordance with the provisions of this section, all obligations of the debtor to each of its customers relating to, or net equities based upon, securities or cash by the delivery of securities or the effecting of payments to such customer (subject to subsection (f) (1) of this section, to the extent that such payments are made out of advances from SIPC under such subsection) insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee, whether or not such customer shall have filed formal proof of such claim. For that purpose the court among other things shall—

(1) in respect of claims relating to securities or cash, authorize the trustee to make payment out of moneys made available to the trustee by SIPC notwithstanding the fact that there shall not have been any showing or determination that there are sufficient funds of the debtor available to make such payment; and

(2) in respect of claims relating to, or net equities based upon, securities of a class and series of an issuer, which are ascertainable from the books and records of the debtor or are otherwise established to

the satisfaction of the trustee, authorize the trustee to deliver securities of such class and series if and to the extent available to satisfy such claims in whole or in part, with partial deliveries to be made pro rata to the greatest extent considered practicable by the trustee.

Any payment or delivery of property pursuant to this subsection may be conditioned upon the trustee requiring claimants to excute in a form to be determined by the trustee, appropriate receipts, supporting affidavits, and assignments, but shall be without prejudice to the right of any claimant to file formal proof of claim within the period specified in subsection (e) of this section for any balance of securities or cash to which he may deem himself entitled.

(h) *Proof of claim by associates and others.*—The provisions of this section permitting discharge of obligations of the debtor to pay cash or to deliver securities without formal proof of claim shall not apply to any person "associated" with the debtor as defined in section 78c(a) (18) of this title, to any beneficial owner of 5 per centum or more of the voting stock of the debtor, or to any member of the immediate family of any of the foregoing.

(i) *Reports by trustee to court.*—All reports to the court by a trustee (other than reports required to be filed pursuant to section 567(3) of Title 11) shall be in such form and detail as, having due regard to the requirements of section 78q of this title and the rules and regulations thereunder and the magnitude of items and transactions involved in connection with the operations of a broker or dealer, the Commission shall determine by rules and regulations to present fairly the results of such proceeding as at the dates or for the periods covered by such reports.

(j) *Effect of chapter on claims.*—Except as otherwise provided in this section, nothing in this section shall limit

the right of any person to establish by formal proof such claims as such person may have to payment, or to delivery of specific securities without resort to moneys advanced by SIPC to the trustee.

• • • •

Section 7(b) **§78ggg. SEC functions**

(b) *Enforcement of actions.*—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

• • • •

Section 9 **§78iii. Functions of self-regulatory organizations**

(a) *Collecting agent.*—Each self-regulatory organization shall act as collection agent for SIPC to collect the assessments payable by all members of SIPC for whom such self-regulatory organization is the examining authority, and members of SIPC who are not members of any self-regulatory organization shall make payment direct to SIPC. An examining authority shall be obligated to remit to SIPC assessments made under section 78ddd of this title only to the extent that payments of such assessments are received by such examining authority.

• • • •

(c) *Inspections.*—The self-regulatory organization of which a member of SIPC is a member shall inspect or examine such member for compliance with applicable financial responsibility rules, except that if a member of SIPC is a member of more than one self-regulatory organization,

SIPC shall designate one of such self-regulatory organizations to inspect or examine such member of SIPC for compliance with applicable financial responsibility rules. Such self-regulatory organization shall be selected by SIPC on the basis of regulatory procedures employed, availability of staff, convenience of location, and such other factors as SIPC may consider appropriate for the protection of customers of its members.

• • • •

Section 12 §78*lll*. Definitions

For purposes of this chapter:

(1) *Self-regulatory organization.*—The term "self-regulatory organization" means a national securities exchange or a national securities association registered pursuant to subsection (b) of section 78*o*-3 of this title.

• • • •

(3) *Examining authority.*—The term "examining authority" means, with respect to any member of SIPC, the self-regulatory organization which inspects or examines such member of SIPC or the Commission if such member of SIPC is not a member of any self-regulatory organization.

APPENDIX E

[Other Statutory and Constitutional Provisions Involved]

TENNESSEE LONG-ARM STATUTE

20-235. *Jurisdiction of persons unavailable to personal service in state—Classes of actions to which applicable.*—Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

(a) The transaction of any business within the state;

(b) Any tortious act or omission within this state;

(c) The ownership or possession of any interest in property located within this state;

(d) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;

(e) Entering into a contract for services to be rendered or for materials to be furnished in this state.

(f) Any basis not inconsistent with the constitution of this state or of the United States.

"Person" as used herein shall include corporations and all other entities which would be subject to service or process if present in this state. Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative. ch. 67, § 1; 1972 (Adj. S.), ch. 689, § 1.

UNITED STATES CONSTITUTION

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness againt himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.